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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 152

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., JUDGES OF THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN, SERVICE PARKING GROUNDS, CIVIC CENTER GARAGE, INC., MADISON PARKING CO., ET AL.,

Appellants,

vs.

CITY OF DETROIT, JOHN H. WITHERSPOON, CONTROLLER, AND JAMES A. HOYE, DEPUTY COMMISSIONER AND DIRECTOR OF TRAFFIC OF THE POLICE DEPARTMENT, OF SAID CITY OF DETROIT

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF MICHIGAN

No. 46,054

CITY OF DETROIT, JOHN H. WITHERSPOON, CONTROLLER, AND JAMES A. HOYE, DEPUTY COMMISSIONER AND DIRECTOR OF TRAFFIC OF THE POLICE DEPARTMENT, OF SAID CITY OF DETROIT, *Plaintiffs,*

vs.

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., JUDGES OF THE CIRCUIT COURT FOR WAYNE COUNTY, MICHIGAN, SERVICE PARKING GROUNDS, CIVIC CENTER GARAGE, INC., MADISON PARKING CO., PARKING REALTY COMPANY, PARKING INVESTMENT CORPORATION, PARK PLACE CORPORATION, THEATRE PARKING, INC., UNION PARKING COMPANY, INCORPORATED, (ALL MICHIGAN CORPORATIONS), JOSEPH FEE AND BEULAH FEE, CO-PARTNERS AS WILLIS PARKING CO., JOSEPH M. JOSEPH, D/B/A ADAMS PARKING CO., HYMAN MILLER AND TILLIE MILLER, CO-PARTNERS AS JEFFERSON PARKING, SIDENY POZEN, D/B/A SIDMAR PARKING CO., GEORGE SALLOUM, D/B/A FOX PARKING CO., GEORGE RASHID, D/B/A BAGLEY PARKING CO., SAMUEL C. BINKOW, M. BERTHA BINKOW, JOSEPH KATCHKE AND IRMA J. KATCHKE, CO-PARTNERS AS BRIGGS PARKING, AND LOTTIE FELDMAN, *Defendants*

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Come now the appellees, City of Detroit, a municipal corporation, John H. Witherspoon, Controller of the City

of Detroit, and James A. Hoye, Deputy Commissioner and Director of Traffic of Detroit Police Department, and file their statement in opposition to jurisdiction, and hereby move the Court to dismiss the appeal or affirm the decision of the Supreme Court of Michigan from which decision and order granting writs of prohibition and mandamus said appeal is taken, or, if the appeal be treated as an application for certiorari, appellees move the Court to deny the application.

Nature of the Case

On December 15, 1953, appellants, owners and operators of off-street parking facilities in the City of Detroit, filed a bill of complaint in the Circuit Court for the County of Wayne, Michigan (a court of original jurisdiction), asking for an injunction restraining the City of Detroit from consummating its proposed revenue bond financing for municipal off-street parking facilities and from using money collected from street parking meters for municipal off-street parking facilities. Appellees also asked for a declaration of rights dealing with the aforesaid subjects and set forth the basis for their litigation, as follows:

> "29. The value of the properties used by plaintiffs in their business of operating and furnishing off-street automobile parking facilities, and also of said business, exceeds several millions of dollars, and to a great extent as to said properties, and to the entire extent as to said businesses, is dependent upon a reasonably profitable operation of said businesses of furnishing off-street automobile parking facilities. If said properties cannot profitably be used for such purposes, or if said businesses cannot be operated profitably, by reason of resort to improper or illegal means by the City of Detroit, or because of its improper or illegal regulation of the streets in said City or the wrongful exercise of the City's duties in respect of the use of said streets by the public, or because of the City's improper or illegal use of moneys collected for or because of on-street parking,

or by reason of the City improperly, illegally or unfairly competing with plaintiffs and others in the like business, great and irreparable loss and damage will result to plaintiffs and to each of them." (Being paragraph 29 of appellants' bill of complaint).

On December 30th, appellees filed a motion to dismiss said bill of complaint on the grounds that plaintiffs were not proper parties nor entitled to bring the action, that the bill of complaint did not state a cause of action or any grounds for equitable relief, and that the court lacked jurisdiction of both the plaintiffs and the subject matter. On the next day, December 31, appellees applied to the Supreme Court of Michigan for writs of prohibition and mandamus to stay further proceedings in the circuit court. Appellees alleged that plaintiffs were not proper parties, nor entitled to bring the action, that all the matters contained in the bill of complaint had theretofore been determined by the Supreme Court, and that the early disposition of the matter was imperative because of the great public importance to the City of Detroit, because of the great need for immediate provision for adequate off-street parking, and because the usual processes of preliminary hearings, trials and appeals through the lower courts would involve unavoidable delays and continue a long history of vexatious litigation designed solely for the purpose of preventing the issuance of bonds for the financing of these public projects. On January 4th, the Supreme Court of Michigan issued its order to show cause why the writs should not issue. Appellants filed their response, as did the judges of the lower court. Appellees filed answers to both, and briefs in support of the position of the parties were also filed. Briefs were also filed in support of the petition of the City of Detroit by amici curiae, namely, Downtown Property Association, Building Owners and Managers Association, Detroit Hotel Association, Traffic Safety Association of Detroit, Detroit Convention and

Tourist Bureau, Automobile Club of Michigan, City of Ann Arbor.

Hearing was had in the Supreme Court of Michigan on January 14th, at which hearings the parties were represented by counsel and arguments presented. Thereafter, further briefs were filed by the parties.

On February 18th, the Court rendered its decision, represented by a written opinion and an order directing the issuance of writs of prohibition and mandamus.

The opinion of the Court held that plaintiffs were not proper parties to institute such an action, did not have the required interest to justify the suit, held that appellees' allegations relative to the imperative need for an early disposition were fully justified, and concluded by passing on all of the questions asked by the appellants going to the merits of the case (except tax exemption question which the court held was premature) and as set forth in its application in the lower court for a declaration of rights. Appellants subsequently filed application for rehearing and brief in support thereof and reply and supplemental reply briefs. Rehearing was denied on April 6, 1954. Appellants now bring this appeal to the Supreme Court of the United States.

Issues

This appeal raises four issues, in none of which is there a substantial federal question such as would confer jurisdiction upon this Court.

The issues are:

(1) This is not a proper matter for appeal but should be considered as an application for certiorari.

(2) The order of the Supreme Court of Michigan, granting the writs of prohibition and mandamus did not deprive the appellants of federal constitutional rights of due process and equal protection.

(3) No decision of a federal question was involved, necessary or controlling in the determination of the cause by the Supreme Court of Michigan.

(4) The appellants were not deprived of due process or equal protection under the Federal Constitution by the ordinances or laws, the validity of which was challenged in the circuit court proceeding.

ARGUMENT

I

This Is Not a Proper Matter for Appeal but Should Be Considered as an Application for Certiorari

This Court has held that:

> "Certiorari, not writ of error (appeal) is the only mode of reviewing in the Federal Supreme Court the judgment of a state court granting a writ of prohibition over the objection that such prohibition would take property without the due process of law, contrary to the 14th amendment to the Federal Constitution."
>
> *Bullock* v. *Florida ex rel. Railroad Comm.*, 254 U. S. 513, 65 L. Ed. 380.

Appellees contend, therefore, that application for certiorari and not direct appeal is the only method of removal of this type of case from the Supreme Court of Michigan to the Supreme Court of the United States, and this appeal should, therefore, be considered as an application for certiorari.

In addition to the lack of a substantial federal question, as heretofore shown, there are no special and important reasons for granting certiorari as required by *U. S. Supreme Court Rule 38(5)*.

28 *U.S.C.A. 2103.*

II

The Order of the Supreme Court of Michigan, Granting the Writs of Prohibition and Mandamus, Did Not Deprive the Appellants of Federal Constitutional Rights of Due Process and Equal Protection

Appellants claim they had a right to trial in lower court of facts in issue under the 14th Amendment to the Federal Constitution. No such right is recognized by this Court. This Court has said:

> "The 14th amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it is obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords opportunity to be heard, that the mere question of whether it was a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of these words. Whether the court of last resort (of Michigan) properly construed its own Constitution and laws in determining that the summary process (prohibition and mandamus) under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the (Michigan Supreme) Court."
>
> *Iowa Central Ry. Co.* v. *State of Iowa*, 160 U. S. 389, 40 L. Ed. 467.

To the same effect:

> *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230, 44 L. Ed. 751;

Seattle R. & G. R. Co. v. *Washington ex rel. Linhoff*, 231 U. S. 568, 58 L. Ed. 372;

McDonald v. *Oregon R. & Nav. Co.*, 233 U. S. 665, 58 L. Ed. 1145;

Leeper v. *State of Texas*, 139 U. S. 462, 35 L. Ed. 225;

Ex Parte Wall, 107 U. S. 265, 27 L. Ed. 552;

Lambert v. *Central Bank of Oakland*, 85 Fed. (2d) 954;

St. Louis I. R. Co. v. *Taylor*, 210 U. S. 281, 52 L. Ed. 1061.

Appellants were accorded the same treatment, with notice and opportunity to be heard, as all other citizens are in accordance with the laws and decisions of the Supreme Court of Michigan, applicable to proceedings in that court for prohibition and mandamus. *Compiled Laws of Michigan, 1948*, Sec. 601.9 and 636.10 (M.S.A. 27.29 and 27.2237):

> 601.9 "The supreme court shall have a general superintending control over all inferior courts, to prevent and correct errors and abuses therein, where no other remedy is expressly provided by law, and shall have also jurisdiction of suits, actions and matters brought before it by writ of certiorari or writ of error, when the same shall be allowed by law to any inferior court, to magistrates and other officers, as well in cases of prosecution for any offense, misdemeanor or penalty, in the name of the people of this state, as in other cases, and by certificate of any circuit judge of any cause pending or tried before him, or by a case made and agreed upon by the parties or their attorneys, in any circuit court, and certified by the clerk of such circuit court, and shall have power to issue writs of error, certiorari, habeas corpus, mandamus, quo warranto, procedendo, prohibition, supersedeas, and all other original and remedial writs which may be necessary for the due execution of the law and the administration of justice, and the full and perfect exercise of its jurisdiction, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only."

636.10 "Writs of prohibition shall be issued only out of the supreme court; and such writs shall be applied for upon affidavits, by petition, in the same manner as writs of mandamus; and if the cause shown shall appear to the court to be sufficient, a writ shall be thereupon issued, which shall command the court and the party to whom it shall be directed, to desist and refrain from any further proceedings in the suit or matter specified therein until the next term of the said supreme court, and the further order of such court thereon; and then to show cause why they should not be absolutely restrained from any further proceedings in such suit or matter."

Sections 636.11 through 636.15, Compiled Laws of 1948 (M.S.A. 27.2238-27.2242) as to procedure in prohibition were complied with.

Amberg v. *Welsh*, 325 Mich. 285, 38 N. W. (2d) 304;

State Bar of Michigan v. *Carr*, 307 Mich. 393, 12 N. W. (2d) 408;

McNally v. *Bd. of Canvassers*, 316 Mich. 551, 25 N. W. (2d) 613;

Scott v. *Chambers*, 62 Mich. 532, 29 N. W. 94.

The Supreme Court of Michigan, by its opinion and decision in this matter, determined, first, that the court had no jurisdiction of the parties, thereby deciding the case on a question of local law and procedure, and second, that on the merits of the case, the law as applied to the issue involved in the case gave the appellants (plaintiffs in circuit court) no cause of action. The decision of the Supreme Court, in effect said that the many cases on the subject previously decided by the Court on the same and similar issues, ordinances and laws, precluded further consideration of the subject matter. A trial of the issues of fact was therefore wholly unnecessary and would have accomplished no different result.

In addition, it should be noted that by this procedure, prohibition and mandamus, appellants were secured as comprehensive a hearing as they would have had, had the case been considered on a motion to dismiss for lack of jurisdiction of parties and subject matter and not stating a cause of action and appeal from a decision adverse to them thereon. The only thing they lost was delay.

Appellants had their day in court, and they, therefore, were not deprived of due process or equal protection under the *Constitution of the United States, Amen. 14.*

In a case similar to the one at bar, and in which the learned counsel for appellants in this case had sought and been granted a writ of prohibition and mandamus by the Supreme Court of Michigan for his client, the State Bar of Michigan, the Circuit Court of Appeals, 6th Circuit, said (as to the same contention made by appellant in that case as is here made by appellants in this case concerning denial of due process and equal protection):

In *Emmons* v. *Smith*, 149 Fed. (2d), p. 869, the Circuit Court of Appeals, 6th Circuit, said:

> "* * * That thereupon plaintiff filed a bill in the Circuit Court of Ingham County against the State Bar of Michigan for a judicial determination of his rights under the aforesaid decrees. The bill in the Ingham County Court sought injunctive relief against the State Bar of Michigan, the defendants therein, and an order issued against the State Bar to show cause why an injunction should not issue. The complaint avers that the Supreme Court of Michigan issued a writ of prohibition restraining the Judge of the Ingham County Circuit Court from taking jurisdiction of the bill of complaint filed therein. The present complaint does not so aver, but the truth, as it appears in the opinion of the Supreme Court, State Bar of Michigan v. Carr, 307 Mich. 393, 12 N. W. (2d) 408, is that the State Bar of Michigan was the petitioner for the writ of prohibition.

"* * * The theory of the bill is that the Supreme Court of Michigan was without constitutional authority to issue the writ of prohibition; that its action denied plaintiff due process of law and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution; and that the 'Act to create the State Bar of Michigan' (Act 58 of the Public Acts of 1935) violates Art. XII, §§ 1 and 2 of the Michigan State Constitution, and that the Supreme Court of Michigan had deprived plaintiff of his constitutional rights to a hearing on the matters averred in the bill of complaint in the Ingham County Circuit Court.

"* * * Apropos of the charge that plaintiff was denied due process of law and equal protection of the laws, it is enough to say that Article VII, § 4 of the Constitution of the State of Michigan vests in the Supreme Court 'general superintending control over all inferior courts; and * * * power to issue * * * and other original and remedial writs, and to hear and determine the same,' and that under Sec. 27.29 of the Michigan Judicature Act, Mich. Stat. Ann. Vol. 20, p. 71, Comp. Laws 1929, § 13535, the Supreme Court is granted specific power to issue 'writs of * * * prohibition * * * and * * * other original and remedial writs which may be necessary for the due execution of the law and the administration of justice, and the full and perfect exercise of its jurisdiction, and to hear and determine the same.

"The complaint sets out that plaintiff was a party defendant to the petition for the writ of prohibition and appeared before the Supreme Court and made his defense thereto and that after the writ issued in conformity with the court's opinion, the plaintiff filed at least two petitions to rehear, in which he set up the same constitutional objections now advanced and that these petitions for rehearing and reconsideration were denied. In other words, the complaint fails to show that plaintiff was denied any reasonable opportunity to make his defense before the Supreme Court. The contention that he was denied the benefit of due process

therefore necessarily fails. State of Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 42, 46 S. Ct. 384, 70 L. Ed. 818. The complaint that the issuance of the writ of prohibition was erroneous falls far short of a challenge that due process was lacking in the proceedings which led up to it. See American Ry. Express Co. v. Commonwealth of Kentucky, 273 U.S. 269, 47 S. Ct. 353, 71 L. Ed. 639; Arrowsmith v. Harmoning, 118 U.S. 194, 195, 6 S. Ct. 1023, 30 L. Ed. 243; Iowa Central Ry. Co. v. State of Iowa, 160 U.S. 389, 393, 16 S. Ct. 344, 40 L. Ed. 467; Tracy v. Ginzberg, 205 U.S. 170, 177, 27 S.Ct. 461, 51 L. Ed. 755; Bonner v. Gorman, 213 U.S. 86, 29 S. Ct. 483, 53 L. Ed. 709; Central Land Co. v. Laidley, 159 U.S. 112, 16 S. Ct. 80, 40 L. Ed. 91; McDonald v. Oregon R. & Nav. Co. 233 U.S. 665, 669, 34 S. Ct. 772, 58 L. Ed. 1145.

"The contention that plaintiff was denied equal protection of the laws as provided by the Fourteenth Amendment is unwarranted. There is nothing of substance in the complaint that the writ of prohibition was arbitrarily or capriciously issued or with any intention of affecting the rights of plaintiff as distinguished from those of any other citizen who had been or who might be found in the same class or confronted with the same circumstances. See Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 290, 293, 18 S. Ct. 594, 42 L. Ed. 1037."

Certiorari was denied in this case by the U.S. Supreme Court, 326 U. S. 746. Same case in 13 A. L. R. 475—notes on Federal court's jurisdiction.

The reasoning of the above opinion and the U.S. Supreme Court decisions cited as authority, apply with equal force to the present case.

Under Michigan law the writ of prohibition is a discretionary writ which can only be issued by the State Supreme Court and the rules as to granting or denying it are the same as in mandamus cases.

Kloka v. *State Treasurer*, 318 Mich. 87, 27 N. W. (2d) 507;

Pt. Huron Savings Bank v. *St. Clair Circuit Judge*, 147 Mich. 551;

Constitution of Michigan, Art. VII, Sec. 4;

Compiled Laws of Michigan, 1948, secs. 601.9 and 636.10 (MSA 27.29 and 27.2237).

In the case of *Tawas & Bay Co. R.R. Co.* v. *Circuit Judge of Iosco Co.*, 44 Mich. 479, the Supreme Court of Michigan, as to the nature of, and authority of the Supreme Court to issue original writs, said:

> "The jurisdiction of this court in mandamus cases is not statutory, but plenary, and supervision is given over all inferior tribunals by the Constitution, Art. 6, sec. 3. Under the Constitution legal and equitable jurisdiction is united in the circuit courts, and it is enjoined that distinctions between the two jurisdictions shall be removed as far as possible. Sec. 5. In granting this remedy, courts are always disposed to confine it to cases where there is no other adequate specific remedy. But the existence of a remedy of another nature which is not adequate furnishes no reason for refusing it, if the necessity of justice requires it. We had occasion in LaGrange, relator v. State Treasurer 24 Mich. 468, to consider this jurisdiction quite fully and we think the views there expressed are in accordance with the soundest authority. Mandamus is a prerogative writ designed to afford a summary and specific remedy in those cases where without it the party will be subjected to serious injustice. As pointed out by the eminent authorities there cited, it is from its very nature a remedy that cannot be hampered by any narrow or technical bounds. The right coupled with the necessity of such a vindication of it supports the jurisdiction, and the court in using its discretion, while careful not to use this writ when it is not essential, will apply where it is.
>
> "As the English Chancery was not inferior to the King's Bench, that is reason enough why there are no

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precedents for the writ in chancery cases. But as explained in the cases just cited it is well settled that the existence of a specifiic remedy in equity does not oust the legal jurisdiction, but only appeals to the discretion of the common law court. Mr. Spence in his treatise on Equitable Jurisdiction refers to the jurisdiction in mandamus as one which if freely exercised might have rendered much of the interference of equity needless. 1 Spence Eq. Jur. 704. In a majority of cases the usual remedies are sufficient, and the necessary delays attending them are not so serious as to require any extraordinary remedy."

The Michigan Supreme Court (as well as other courts throughout the country) has long recognized that public interest and circumstances of urgency warrant the issuance of the writs of prohibition and mandamus to provide an adequate and speedy remedy where the delays attendant upon disposition of a case by a lower court and appeal would cause injustice or inconvenience and where the lower court lacks jurisdiction of the matter for any reason.

Amberg v. *Welsh*, 325 Mich. 285, 38 N. W. (2d) 304;
Loranger v. *Navarre*, 97 Mich. 615;
Evans v. *Superior Court*, 96 P. (2d) 107;
State Bar of Michigan v. *Carr*, 307 Mich. 393, 12 N. W. (2d) 408;
Scott v. *Chambers*, 62 Mich. 532; 29 N. W. 94;
Smith v. *State Board of Canvassers*, 220 Mich. 318;
McNally v. *Wayne Co. Canvassers*, 316 Mich. 551, 25 N. W. (2d) 613;
Baltimore Mail S.S. Co. v. *Fawcett*, 199 N. E. 628.

The petition for the writs filed in the Supreme Court of Michigan by appellee, City of Detroit, et al., shows the public interest and urgency of the matter and the delays already occasioned by repeated litigation in the providing of off-street parking in Detroit, as well as the lack of jurisdiction of the lower court.

It was upon this basis that the Supreme Court issued the writs in conformity with its previous decisions, and because the issues involved were previously adjudicated (except one which was was prematurely raised).

III

No Decision of a Federal Question Was Involved, Necessary, or Controlling in the Determination of the Cause by the Supreme Court of Michigan

The Supreme Court of Michigan, in its decision to issue writs of prohibition and mandamus did not decide any federal question, but even if it might be said that they did by inference, such decision was neither necessary nor controlling because of the fact that they decided that the lower court lacked jurisdiction of the case below for the reason that the plaintiffs had no standing in court to bring such an action.

This court has said:

> "We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for a record to show that a federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it."
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> *Brown* v. *Atwell*, 92 U. S. 327; 23 L. Ed. 511;
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> *California Power Works* v. *Davis*, 151 U. S. 391; 38 L. Ed. 206;
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> *Bonner* v. *Gorman*, 213 U. S. 85; 53 L. Ed. 709;
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> *DeSaussure* v. *Gaillard*, 127 U. S. 216, 32 L. Ed. 125;
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> *Castillo* v. *McConnico*, 168 U. S. 674, 42 L. Ed. 662;
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> *State ex rel. Citizens Bank of Louisiana* v. *Bd. of Liquidation*, 98 U. S. 140, 25 L. Ed. 114.

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In the *Castillo* case, above, this Court said:

> "Even though it be that a Federal controversy was decided, nevertheless, if the questions of a purely state character, upon which the Supreme Court of Louisiana passed, are completely adequate to sustain the decree by that court, rendered wholly independent of the Federal question, it will result that no Federal issue is presented for review. Egan v. Hart, 165 U.S. 188, 41 L. Ed. 680; Powell v. Brunswick County, 160 U.S. 441, 37 L. Ed. 1137, and authorities referred to in both the foregoing cases."

The jurisdictional question decided by the Michigan Supreme Court was "completely adequate to sustain the order by that court" and "was rendered wholly independent of a Federal question" and was a question of local law.

City and County of San Francisco v. *Itsell*, 133 U. S. 65, 33 L. Ed. 570;
Klinger v. *State of Missouri*, 80 U. S. 257, 20 L. Ed. 635.

The decision by the Michigan Supreme Court that the appellants had no standing in court was a decision under local law of a jurisdictional question, making its further decision on the merits unnecessary and not controlling.

IV

The Appellants Were Not Deprived of Due Process or Equal Protection Under the Federal Constitution by the Ordinances or Laws, the Validity of Which Was Challenged in the Circuit Court Proceeding

Not being proper parties plaintiff in the original proceeding, appellants could not challenge the validity of the ordinance or laws involved on any grounds.

Under the circumstances of this case (no taxes being involved and no increase in taxes being claimed– the ordi-

nances providing for financing of the city's off-street parking lots by revenues solely), the appellants had no standing to sue as taxpayers.

Menendez v. *City of Detroit*, 337 Mich. 476;

Nichols v. *State Administrative Board*, 338 Mich. 617.

As competitors of the City in the operation of off-street parking facilities, they had no standing to bring the action.

In *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 82 L. Ed. 374, this Court said:

> "The claim that petitioner will be injured, perhaps ruined by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of damnum absque injuria. * * * State in other words, those municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operation of the municipalities, it will be by lawful competition from which no legal wrong results."
>
> "What petitioner anticipates, we emphasize is damage to something it does not possess—namely, a right to be immune from lawful municipal competition."

In *Puget Sound Power & Light Co.* v. *City of Seattle*, 291 U. S. 619, 78 L. Ed. 1025, this Court said:

> "The injury which appellant fears may result is the consequence of competition by the City and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the damage of such an injury fails to point the way. Legislation may protect from the consequences of competition but the Constitution does not."

In *Andrews* v. *City of South Haven*, 187 Mich. 294, L. R. A. 1916A, the Supreme Court of Michigan said:

> "* * * the fact that a city engaging in a certain line of activity, commercial in its nature, competes with and thereby damages one of its inhabitants in his business, does not entitle him to relief, for the city owes him no immunity from competition."

In *Gate City Garage* v. *City of Jacksonville*, 66 S. (2d) 653, at p. 660, the Supreme Court of Florida had this to say on the same subject of competition by a city with private parking lot operators:

> "There may be public hospitals, waterworks, electric light plants, and other enterprises acquired and operated primarily for the benefit of the public and there may also be private hospitals, waterworks, and electric light plants acquired and operated primarily for private profit and private gain. When the Legislature specifically authorizes a particular undertaking, such as, the parking system involved in this case, and it is found and determined that such system primarily serves a public and municipal purpose, it is not a valid objection that the municipality will be engaged in competition with private business. This question has been definitely settled contrary to the contentions of the appellants in the cases of Hamler v. City of Jacksonville, 97 Fla. 807, 122 So. 220; State ex rel. Cummer v. Pace, 121 Fla. 871, 164 So. 723; State v. City of Tallahassee, 142 Fla. 476, 195 So. 402; Saunders v. City of Jacksonville, 157 Fla. 240, 25 So. 2d 648; State v. City of Jacksonville, Fla., 50 So. 2d 532.
>
> "We find no provision of the State or Federal Constitutions which prohibits a municipal corporation to acquire, own and operate a system such as that involved in this case because it may be in competition with private individuals, firms and corporations."

The injury which appellants here fear may result from the ordinances and laws involved is the consequence of lawful (note) competition by the City and not the method of financing by revenue from the system rather than taxation. As above stated by this Court, in the *Seattle* case, the appellants here must look to the legislature, not this court to prevent competition by the City of Detroit in the off-street parking business.

That the provision, operation and financing of parking facilities by municipalities, both off-street and on-street, is a lawful municipal concern, is no longer open to question in Michigan and elsewhere. (Note.)

(Note) In *Village of Wayne* v. *Clerk* (*Parr* v. *Ladd*), 323 Mich. 592, 36 N. W. (2d) 157, 8 A. L. R. (2d) 357, the Michigan Supreme Court said:

> "As to the objections to the legality of the ordinance here involved and here raised by the defendant, we conclude that a municipal parking system combining parking facilities both on public streets and on off-street property of a municipality, for which a charge for use is made, is a public use, and a public improvement within the meaning of the revenue bond act; that the acquisition and operation of such system by a municipality is not forbidden by the Michigan Constitution; that a municipality has the power to pledge the net revenues therefrom for the acquisition of off-street property and the operation and maintenance thereof as a part of such system; that the municipality has the power to issue revenue bonds payable solely out of the net revenues derived from the operation of such system, and to pledge such net revenues for payment of such bonds; and that the municipality has the power to pledge itself to acquire and maintain parking meters on such street and off-street property, and charge rates for the use of such facilities to provide for the payment of such bonds."

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To the same effect—

Cleveland v. *City of Detroit*, 324 Mich. 527, 37 N. W. (2d) 625, 11 A. L. R. (2d) 171;
Menendez v. *City of Detroit*, 337 Mich. 476, 60 N. W. (2d) 319;
Detroit v. *Wayne Circuit Judges*, 339 Mich. 62 (case below);
Stolorow v. *City of Pontiac*, 339 Mich. 199;
In re Widening of Fulton Street, 248 Mich. 13, 64 A. L. R. 1507;
Bowers v. *City of Muskegon*, 305 Mich. 676, 9 N. W. (2d) 889.

In accord with Michigan:

Poole v. *Kankakee*, 94 N. E. (2d) 416;
Miller v. *City of Georgetown*, 191 S. W. (2d) 403;
McGorley v. *Fitzgerald*, 59 Atl. 142;
Gate City Garage v. *Jacksonville*, 66 So. (2d) 653;
State v. *Chambers*, 77 S. E. (2d) 297;
Denihan Enterprises v. *O'Dwyer*, 99 N. E. (2d) 235;
Whittier v. *Dixon*, 151 P. (2d) 5, 153 A. L. R. 956;
Bowman v. *Kansas City*, 233 S. E. (2d) 26;
San Francisco v. *Lenares*, 106 P. (2d) 369;
Richmond v. *Dervishian*, 57 S. E. (2d) 120;
Mich. Blvd. Bldg. v. *Chicago Park Dist.*, 106 N. E. (2d) 359;
Florida v. *City of Miami Beach*, 47 So. (2d) 865;
Brodhead v. *City of Denver*, 247 P. (2d) 140;
Barnes v. *City of New Haven*, 98 A. 2d 523;
State v. *Rhodes*, 100 N. E. (2d) 225;
State v. *City of Miami Beach*, 47 So. (2d) 865;
Chase v. *City of Sanford*, 66 So. (2d) 653.

"One of the elementary doctrines of constitutional law firmly established by authorities, is that the consti-

> tutionality of a legislative act is open to attack only by a person whose rights are affected thereby. Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement of his rights."
>
> *11 Am. Jur.* 748.

To the same effect:

16 C. J. S. 157

and numerous citations in notes.

In accordance with the law as laid down by this Court and other authorities above, appellants have no legal rights or interest in the ordinances or laws involved which would permit them to attack them on constitutional grounds or otherwise and therefore could not be deprived of due process or equal protection under the 14th Amendment of the Federal Constitution.

Relief

In the first section of the Argument, appellees have submitted that this appeal should, under the rules of this Court, be considered as an application for certiorari. In lieu of such a ruling by the court, appellees are requesting the Court to affirm the decision of the Supreme Court of Michigan, as an alternative to granting a motion to dismiss the appeal, on the ground that it is manifest that this appeal, as well as all of the preceding litigation, is taken for the purpose of delay only, and that the questions raised by the appellants are so unsubstantial as not to need further argument. We support these statements by a description of the litigation hereinbefore set forth, the decision of the Supreme Court of Michigan, the record, and our argument herein.

(*U. S. Supreme Court Rule 7*, Sub. 4)

Conclusion

Appellees respectfully submit that the appellants have failed to raise a substantial federal question or to show any deprivation of rights to due process or equal protection under the 14th Amendment of the Federal Constitution, and therefore, appellees' motion to dismiss or affirm should be granted or, if the appeal is to be considered as an application for certiorari, the application should be denied.

For the same reasons urged by appellees in their Petition for Prohibition—Mandamus filed in the Supreme Court of Michigan, as to the urgency and importance of an early determination and conclusion of the Circuit Court cause, appellees now respectfully urge an early determination of this appeal on their motion to dismiss.

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